

TANZANIA / JUDGMENT

martin alphonse kisere vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MOSHI (CORAM: MUGASHA, J.A.. MWAN DAMBO, 3.A. And MAIGE, 3.A.1) CRIMINAL APPEAL NO. 289 OF 2020 MARTIN ALPHONCE @ KISERE 1st APPELLANT THOMAS JOHN 2NDAPPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Moshi) fMwenempazi, J.l dated the 27th day of May, 2020 in Criminal Appeal No. 26 of 2019 JUDGMENT OF THE COURT 18th & 26th September, 2023 MWANDAMBO, J.A.: The District Court of Moshi tried, convicted and sentenced the respondents, Martin Alphonse @ Kisere and Thomas John of two counts of armed robbery. The duo were alleged to have committed the offence on 22 January, 2017 at a village called Maua within Moshi District, Kilimanjaro Region involving stealing of cash amounting to TZS 40,000.00 and one cell phone, property of Leonia w/o Zacharia Kisoka in the first count and one cell phone worth TZS 27,000.00 property of Anti pas Joseph Massawe in the second count. It was alleged in the charge sheet that the appellant used a panga immediately before or after such stealing in order to threaten the victim to obtain and retain the stolen properties. The appellants denied the accusations against them which resulted into their trial involving six witnesses for the prosecution and two for the defence. At the end of it all, the trial court found the evidence adduced by the prosecution proved the charge on both counts on the required standard resulting, into a finding of guilt and the sentences of 30 years" imprisonment ordered to run concurrently. The appellants' appeal before the High Court sitting at Moshi was dismissed for want of merit. The complaint before the first appellate court was/ unsurprisingly so, that their conviction was grounded on weak evidence of identification laden with contradictions and inconsistencies. They also complained against the trial court's failure to consider their submissions. IHwenempazi, J. who heard their appeal was satisfied that the appellants were positively identified at the scene of crime on the material date and time. Similarly, the first appellate court found no merit in the appellants' complaint premised on existence of contradictions and consistencies in the prosecution evidence. It reasoned that, such contradictions on the evidence by PW1 and PW3 on the one hand and PW6 on the other regarding the date on which the victims of the offence went to the hospital (PW1 and PW3) were too minor to go the root of the case. It thus dismissed the appeal and hence this second and final appeal before the Court. The tale resulting into the arraignment of the appellants and eventually their convictions and sentences runs as follows: on

the night of 22 January 2017, Leonia Zakaria Kisoka (PW1) and Anti pas Joseph Massawe (PW3) were invaded by bandits at their home at Maua village within Moshi District. During the invasion, one Mariana Martine (PW4), a neighbour had visited PW1. The bandits who are said to have been three in number, had pangas and club stormed into the kitchen where PW1 and PW4 were seated, and ordered them to squat for some time before demanding TZS 1,000,000.00 from PW1 and beating her with a flat side of a panga in her head. Within moments, PW1 was led into her bedroom in the main house in search for money demanded by her assailants. However, PW1 was only able to get TZS 40,000.00 which she surrendered to the bandits. Meanwhile, PW4 managed to escape and raised an alarm for help from neighbours. Apparently, the bandits had left PW1 who was at that time in the main house with her son (PW3) and managed to shut the door 3 to that house only to be broken into a little later by the bandits using an axe. This time around, the bandits roughed up PW1 beating her with a club, They also attacked PW3 breaking his hand followed by threats of killing them if they disclosed the ordeal to anyone. At the end of it all, they snatched two cell phones from PW1 and PW3 and took to their heels. Afterwards, people who responded to PW4's alarm gathered at the scene for rescue to whom PW1 and PW3 disclosed the names of their assailants who were allegedly familiar and resident in the neighbourhood. According to PW1 and PW3, they managed to identify the assailants through bright light illuminated by bulbs from inside and outside the house. Subsequently, the appellants were arrested and charged in connection with the offence to which they pleaded not guilty. In their defence following a ruling that they had a case to answer, the appellants distanced themselves from the offence. Nevertheless, the trial court rejected such defences as too insufficient to raise any doubt in the prosecution case which it found proved to the required standard resulting into the impugned conviction and sentences sustained by the first appellate court. Before us, the appellants have preferred a joint memorandum of appeal comprising six grounds of appeal followed by a statement of written 4 arguments in support of the appeal filed in pursuance of rule 74(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). At the hearing of the appeal, the appellants appeared in person, unrepresented. They addressed us orally in brief in support of ground five raising a complaint touching on the unfairness of their trial by reason of the trial court's failure to furnish them with copies of proceedings before entering their defence. It is significant that, this complaint was not one of the grounds before the first appellate court and so it was not determined as such. Be it as it may, we shall entertain it as it raises an issue of law worth the Court's consideration and determination. Since the complaint in ground five touches on the fairness of the trial which may result into nullifying it if sustained, we find it compelling to begin our discussion with it. The appellants' complaint is premised on the Court's decision in Alex John v. Republic, Criminal Appeal No, 129 of 2006 (unreported) in which the Court stated that denying the accused's time and/or facilities in preparation for his defence amounts to unfair trial which may results into nullification of the impugned trial. The appellants argued thus that, since their request to be supplied with copies of 5 proceedings after the ruling on a case to answer to enable them prepare for their defence was not honoured, their trial leading to the convictions and sentences was unfair. In elaboration, the appellants argued that, after a long wait for such copies of proceedings, they reluctantly agreed to proceed with hearing without them. Ms. Eliainenyi Njiro, learned Senior State Attorney who, together with Ms. Revina Prosper

Tibilengwa, learned Principal State Attorney appeared for the respondent Republic resisted the appeal. She invited us to dismiss this ground for being baseless. The learned Senior State Attorney urged that, since supplying the appellant with copies of proceedings is not a legal requirement, the appellants had no basis in complaining that they were unfairly tried. Otherwise, the learned Senior State Attorney argued that the appellants were not prejudiced by the failure to supply them with the proceedings. That was notwithstanding the Court's decision in *Alex John (supra)* reaffirmed in *Samwel Gitau Saitoti @ Saimoo & Another v. Republic* (Criminal Appeal No. 5 of 2016) [2019] TZCA 307 (30 August) TanzLii and *Oscar Justinian Burugu v. Republic* (Criminal Appeal No. 33 of 2017) [2020] TZCA 1873 (25 November, 2020) TanzLii. 6 We think the learned Senior State Attorney's main argument is barely correct in the light of the above decisions regard being to the principle that each case must be decided on the basis of its peculiar facts. It is common ground in this appeal that, after the ruling on a case to answer, the second appellant requested to be supplied with copies of proceedings in preparation for his defence. Hearing was thus adjourned on various occasions from 12 February, 2018 to 15 August, 2018 for several reasons including the absence and change of the trial magistrate. The record does not reflect that the second appellant's request was honoured but, on 15 August 2018, hearing proceeded with defence during which, the appellants are recorded to have been ready for hearing. After the closure of the trial, the appellants filed their joint written submissions referring to the testimonies of prosecution witnesses to vindicate their innocence. In our view, that can only mean that the appellants were in possession of the proceedings even though the record does not indicate that the trial court supplied the much-sought proceedings. Under the circumstances, it is hard to buy the appellants' story. Even if that was so, there is no indication that the failure to supply the said copies occasioned any injustice to the appellants considering that they defended themselves adequately canvassing their arguments after the closure of the trial. Accordingly, ground five lacks merit and we dismiss it. Next for our consideration and determination relates to the complaints in grounds one, two and three argued by the appellants conjointly. These raise the issue whether the appellants were positively identified at the scene of crime on the material night. Stripped of other details, the appellants' arguments have focused at faulting the two courts below for relying on a weak evidence of identification claimed to have been laden with contradictions denting the credibility of the prosecution witnesses particularly on the number of solar lights and the place where such bulbs were fixed and ultimately the light which enabled PW1, PW3 and PW4 to identify the assailants amidst shock and horror from the armed invaders. It is the appellants' arguments that, contrary to the finding of the trial court sustained by the High Court, the conditions for a positive identification were not favourable to PW1, PW3 and PW4; the identifying witnesses. Reinforcing their argument, they cited to us the Court's unreported decision in *Yassini Hamisi Ally @ Big v. Republic*, Criminal Appeal No. 254 of 2013 for the proposition that, 8 identification evidence be it from a single witness or more, must be watertight even if it is one of recognition. Besides, the appellants cited *Jaribu Abdallah v. Republic* [2003] T.L.R. 217 to argue that, in determining the sufficiency of the evidence of identification, the court should consider not only the conditions forming positive identification, but also credibility of the identifying witnesses. This proposition was advanced to support the claim that PW1, PW3 and PW4 were not credible witnesses. This is so because, PW 1 and PW3 on the one hand contradicted

with PW4 on the number of solar light bulbs fixed in the house and their positioning. It was further argued that, despite the claim by PW1 and PW3 that the assailants were familiar to them, their arrest, particularly the second appellant was due to suspicion rather than anything else since, no reason was advanced behind failure to arrest the third one. Additionally, whereas the prosecution claimed through its witnesses including PW5, that after the incident people gathered at the scene of crime and proceeded to the second appellant's home where they were told by his father that he was not in, the said father was not called as a witness. According to them, such failure warranted the trial court drawing adverse inference against the prosecution on the authority of *Azizi Abdallah v. Republic* [1991] T.L.R. 9

71. Finally, the appellants attacked the two courts below for their failure to evaluate the evidence on record as a result of which they arrived at erroneous concurrent findings. They cited *Amirali Ismail v. Republic* [1921 - 1952] T.L.R. (R) 370 for the proposition that a court judgment must sufficiently and plainly reflect reasons justifying a particular finding which was wanting in the impugned decision characterized by the trial court's failure to evaluate the evidence as a whole. Submitting on credibility and reliability of the evidence, the appellants attacked the two courts below allegedly for their failure to assess and test the credibility of witnesses in their evidence as a whole without regard to the appellants' evidence in defence consistent with the Court's decision in *MalOda William & Another v. Republic*, Criminal Appeal No. 256 of 2006 (unreported). On the basis of the foregoing, the appellants contended that they were wrongly convicted as a result of erroneous finding by the trial court sustained by the first appellant warranting the Court's interference and ultimately reversing them to one of not guilty resulting into their acquittal. 10 In reply, Ms. Njiro placed her argument on the Court's decision in *Waziri Amaru v. Republic* [1980] T.L.R. 250 referred in, amongst others, *Emmanuel Mathias v. Republic*, Criminal Appeal No. 132 of 2020 on the guidelines the trial courts should take into account in grounding conviction based on the evidence of identification which include, source of light, time taken by the identifying witnesses with the assailant and credibility of the witnesses. Ms. Njiro argued that, the evidence through PW1, PW3 and PW4 shows that the source of light used to identify the culprits came from six solar bulbs fixed outside the house and some inside the kitchen. Besides, the learned counsel drew our attention to the evidence from the said witnesses showing that the bulbs illuminated bright light coupled with the fact that the victims spent some time with the assailants who were familiar to them. Further, Ms. Njiro argued that the victims named the assailants to the people who gathered at the scene immediately which gave credence to their credibility consistent with the Court's decision in *Jaribu Abdallah* (supra) and *Wangiti Marwa Mwita & Another v. Republic* [2003] T.L.R. 271 cited in *Hassan Hussein v. Republic*, Criminal Appeal No. 41 of 2022 (unreported). She thus urged the Court to dismiss grounds one, li two and three for lack of merit. The appellants had nothing to add in rejoinder. Having examined the appellants' arguments and heard oral submissions from Ms. Njiro in opposition, it is glaring that the appellants are all out to invite the Court to interfere with the concurrent findings of fact by the two courts below. Even though the Court sitting as a second appellate court has limited power to interfere with such

findings where it is plain that they were a result of misapprehension and non-direction of the evidence on record occasioning injustice. If any authority will be required, the Court's decisions in Julius Josephat v. Republic, Criminal Appeal No. 03 of 2017 and Juma Mzee v- Republic, Criminal Appeal No. 19 of 2017 (both unreported) will suffice. We shall approach this appeal on the complaints under discussion from that perspective in our search for truth. We wish to start with the fact that we find it established that appellants were familiar to the identifying witnesses PW1 and PW3 as well as PW4. The nature of the evidence was, under the circumstances, one of recognition rather than visual identification claimed to have been too weak to remove any possibilities of mistaken identity and thus incapable of grounding conviction. That is consistent with the Court's decision in the oft 12 quoted Waziri Amani (supra) and many others including those placed to us by the appellants viz. Yassini Hamis Ally @ Big and Jaribu Abdallah supra). Indeed, discussing ground two in the petition of appeal, the High Court concurred that the appellants were familiar to the identifying witnesses before the incident which removed any possibilities of mistaken identity [at page 194 of the record]. Apparently, the appellants have not assailed that finding with the effect that, the complaint on the appellant's identification must be determined from that perspective regard being to the rule expressed in Issa s/o Mgara @ Shuka v. Republic, Criminal Appeal No. 37 of 2005 (unreported) that recognition evidence by itself does not guarantee a mistaken identity. As to what entails grounding conviction on identification by recognition, in Jumapili Msyete v. Republic, Criminal Appeal No. 110 of 2014 (unreported), the Court made a distinction on the different types of identification; visual, voice and recognition. It stated: - "... Accordingly; the type of evidence required to prove identification, might differ in some aspects, but some may be common in all types of identification. Foundation and assistive evidence, for instance, is necessary in all types of identification, but corroborative may not be. For instance, in visual identification, identification parades, or recent possession, has invariably been used to corroborate, but it may not be so in recognition cases. In visual identification, description of the suspect build or attire may be necessary but in recognition cases, naming the suspect would be sufficient"[At page 16]. The Court re-affirmed itself in its latter decision in Waryoba Elias v. Republic [Criminal Appeal No. 112 of 2020 [2023] TZCA 17314 (9 June

- 2013) TanzLii. As alluded to earlier on, the evidence of identification with which the two courts below concurred in their findings was one of recognition based on familiarity which explains the reason for not conducting an identification parade as would ordinarily be the position in cases involving visual identification evidence where the suspect is a stranger to the identifying witness. Ms. Njiro's argument on the nature of the evidence proving mistaken identity' source and intensity of light and the duration the identifying witnesses had with the assailants is but assistive evidence to give credence and credibility to the witnesses. That augurs well with what we said in Jumapili Msyete (supra) that all what is important is naming the culprits 14 at the earliest possible opportunity. Undeniably, upon our examination of the evidence, there is hardly any dispute regarding the source of light be it from the kitchen, outside or inside the house considering that, at first, the assailants

invaded PW1 from the kitchen where he was preparing food in the company of PW4 before roughing her out after ordering her to squat and forcing her to the main house which was fixed by six bulbs from the outside and some inside it illuminating bright light. Despite the appellants' attack against the credibility of the witnesses based on the alleged contradiction in the number of bulbs, we are satisfied that the contradiction, if any, was too immaterial to affect the substance of their evidence. It is our considered view that, such contradiction could not have been surprising in so far as PW1 and PW3 who were the occupants of the house had similar version compared to PW4 who was a stranger. On the other hand, as submitted by Ms. Njiro, the evidence on record which was found to be credible by both courts below, was to the effect that PW1 and PW3 spent some time with the assailants who were familiar to them which assured an unmistakable identification. That evidence was not assailed apart from the appellants' general denial. In particular, the first appellant attributed his arrest on 24 January 2017 to the conflict he had with PW3 15 having admitted that he stayed at a neighbouring Kibosho Otaruni village. The second appellant for his part who was arrested on 28 January 2017 made a general denial too but while cross-examining PW1, the following came to light: - "The assailant left the neighbour in the kitchen then you escorted me in to the main house to take the money Tshs 1,000,000/=. The neighbour made alarm. Your mother died. You reside with your stepmother called Mama Furaha... you never covered your face. From my village to your village is about 15 minutes..."/[at page 20 of the record]. That the appellants were familiar to the victims was explained in some detail by PW3 who testified to have known the appellants by their names as they were co - boda-boda drivers at the same station. PW3 was emphatic about the role the second appellant played during the material night; holding a matchet he used to hit him. Besides, PW3 told the trial court that he knew the second appellant's home. On the whole, having subjected the evidence to scrutiny, like the two courts below, we are satisfied that the appellants were properly identified through recognition and, consistent with our decision in *Jumapili Msyete*, 16 (supra), the victims, PW1 and PW3 named the assailants to people who gathered including PW5, a hamlet chairman. The naming of the assailants led to a search and subsequently their arrest in a span of few days after the incident. In view of the foregoing, the argument by the second appellant that since he was not found at his father's home on the material night when PW5 and other people went to inquire about him sounds attractive but fails on the face of it. Logically, his absence from his home appears to support the prosecution case placing him at the scene of crime. Equally baseless is the argument faulting the two courts below for not drawing adverse inference against the prosecution for not calling his father as a witness. Aside from Ms. Njiro's argument predicated upon section 143 of the Evidence Act, it has not been suggested that the second appellant's father was a material witness who could have proved that the appellants were identified at the scene of crime. In any case, the prosecution would have assumed too much of a risk summoning the second appellant's father to testify against his son in the absence of any guarantee to the contrary. In the upshot, we endorse Ms. Njiro's submissions in grounds one, two and 17 three which in effect covered ground six as well are unmerited and we dismiss them all. In the event, we find no merit in the appeal and dismiss it. DATED at

MOSHI this 25th day of September, 2023. S.E.A. MUGASHA JUSTICE OF APPEAL L. J. S. MWANDAMBO JUSTICE OF APPEAL IJ. MAIGE JUSTICE OF APPEAL The Judgment delivered this 26th day of September, 2023 in the presence of the Appellants in person and Ms. Revina Tibilengwa, learned Principal State Attorney and Ms. Eliainenyi Njiro, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original. DEPUTY REGISTRAR COURT OF APPEAL 18

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